(24)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 237

R. K. JAPHA, suing on his own behalf and on behalf of all other owners of First and Refunding Mortgage Gold Bonds, Series A, due January 1, 1951, of Chicago, Aurora & Elgin Railroad Company,

Petitioner,

vs.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation, and CITY NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking association,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Motion to Dispense with Printing and Service of Portions of the Record

IRVING L. SCHANZER,
Counsel for R. K. Japha, Petitioner.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-2343

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SUPREME COURT OF THE UNITED STATES

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No.

R. K. JAPHA, suing on his own behalf and on behalf of all other owners of First and Refunding Mortgage Gold Bonds, Series A, due January 1, 1951, of Chicago, Aurora & Elgin Railroad Company,

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PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation, and CITY NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking association,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Motion to Dispense with Printing and Service of Portions of the Record

To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, R. K. Japha, respectfully submits this, his petition for a writ of certiorari to review the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit in the above cause affirming the order of the District Court for the Northern District of

Illinois, Eastern Division, which dismissed his action against the defendant Public Service Company of Northern Illinois.

Statement

The petitioner instituted the above cause as a representative suit on behalf of all holders of certain bonds (R.* 3, 10), secured by a mortgage to a trustee (R. 4-6), of Chicago, Aurora and Elgin Railroad Company (herein called "Railroad Company"), against Public Service Company of Northern Illinois (herein called "Electric Company"), the lessee of the Railroad Company's electric generating plant, transmission lines and substations, which were part of the mortgaged property (R. 10, 11; P. R. 149).

The mortgage securing the bonds is held by the defendant City National Bank & Trust Company of Chicago as successor trustee (R. 7). Upon its refusal to bring this action after demand, it was joined herein as a formal party (R. 14).

The petitioner sought a decree against the Electric Company for an accounting, for the benefit of all the bondholders, for the depreciation in value of the mortgaged property, which had been leased to the Electric Company, on two separate grounds:

> 1. the Electric Company violated a covenant of the lease by which it agreed to maintain and operate the said generating plant, transmission lines and substations, and the equipment therein,

* The record consists of a printed Transcript of Record and a certified photostat copy of certain papers, the printing of which was dispensed with by the Circuit Court of Appeals. References herein made to the printed record are made as "R. . ."; to the photostat copy of papers as "P.R. . ."

and to install certain new and substituted equipment (R. 12, 13); and

2. the Electric Company committed and permitted waste of the leased property (R. 13).

The Railroad Company has been in equity receivership of the District Court since 1932, the receivership having been ordered in a suit (No. 12125) instituted by a creditor other than the mortgagee. The trustee of the mortgage commenced foreclosure proceedings (No. 15893) against the Railroad Company alone in December, 1937 (P. R.* 184), and such proceedings were thereafter consolidated with the receivership proceedings.

Pursuant to an order of the District Court made on December 18, 1933, the receiver of the Railroad Company affirmed the lease of the said part of the mortgaged property to the Electric Company (P. R. 16).

On motion of the Electric Company herein, and without a trial, the petitioner's complaint was dismissed by the District Court (R. 28). Your petitioner's appeal from the order of dismissal having been submitted on briefs on his behalf, without oral argument, and the appellee having submitted briefs and made an oral argument, the order was affirmed from the bench by the Circuit Court of Appeals (R. 62).

Opinions Below

Neither the District Court nor the Circuit Court of Appeals rendered any opinion in this cause, and their respective orders (R. 28, 62) are not reported.

*The photostat record contains documents the pages of which were not consecutively numbered. Petitioner has numbered the pages of the certified copy submitted herewith, and the references are to the numbers which have been added in ink.

Jurisdiction of this Court

The order of the Circuit Court of Appeals was made and entered on May 11, 1943 (R. 62). The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347-a).

The Questions Presented

Because of the absence of any opinion in either of the courts below, the questions presented are determined by the arguments of the defendant Electric Company in the Circuit Court of Appeals. These questions are:

1. Whether a mortgagee* may maintain an action for an accounting against the lessee of the mortgaged property for waste.

2. Whether a mortgagee may maintain an action, as third party beneficiary, against the lessee for breach of covenant to maintain and operate the mortgaged property.

3. Whether the adoption of the lease by a federal equity receiver of the mortgagor, appointed in a contract creditor's suit, bars any suit by the mortgagee against the lessee based on its waste of the property or its breach of covenant to maintain and operate said property without regard to whether the acts complained of occurred before or after the said adoption of the lease.

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* In the Circuit Court of Appeals no question was raised by the Electric Company as to the petitioner's capacity to sue, representing all bondholders, who are, as a class, the *cestuis que trustent* of the mortgage, after the trustee's rejection of his demand that it bring the action. The matter was argued on the basis of the bondholders constituting the mortgagee of the property. For the purpose of clarity petitioner is herein called the "mortgagee".

Specification of Errors

The Circuit Court of Appeals erred,

1. in affirming the summary dismissal of the petitioner's complaint against the Electric Company;

2. in failing to hold that the mortgagee could maintain this action for an accounting against the lessee for waste of the mortgaged property;

3. in failing to hold that the mortgagee could maintain this action, as third party beneficiary, against the lessee for breach of its covenant to maintain and operate the mortgaged property;

4. in failing to hold that the adoption of the lease by the mortgagor's equity receiver did not bar the mortgagee's right to sue the lessee for waste of the mortgaged property and for breach of its covenant to maintain and operate the mortgaged property.

Reasons Relied on for Allowance of the Writ

The issue of mortgage bonds involved in this action was originally in the amount of $5,000,000 (R. 8), of which $4,850,000 is presently outstanding (R. 9). The mortgagor has been in default in the payment of interest since July 1, 1932 (R. 9).

The decision of the Circuit Court of Appeals is in conflict with the local law of Illinois, decisions of other Circuit Courts of Appeal, and decisions of this Court in the following respects:

1. In failing to uphold the right of the mortgagee to sue the lessee of the mortgaged property for waste it is in direct conflict with

Nelson v. *Pinegar,* 30 Ill. 473;
Minneapolis Trust Co. v. *Verhulst,* 74 Ill. App. 350;
Citizens National Bank v. *Joseph Kesl & Sons Co.,* 378 Ill. 428.

It is further in conflict with the proposition, recognized in Illinois, that a mortgagee has a legal interest in the mortgaged property, entitling him to maintain actions based on legal title (*Dorr* v. *Dudderar,* 88 Ill. 107).

It conflicts with the rule obtaining in Illinois that, after default, the mortgagee is the legal owner of the property.

Tuttle v. *Harris,* 297 U. S. 225;
Wolkenstein v. *Slonim,* 355 Ill. 306.

The decision of the Circuit Court of Appeals herein is also directly contrary to its own decision in *Hummer* v. *R. C. Huffman Construction Co.,* 63 F. (2d) 372, which cites with approval the decision in *Delano* v. *Smith,* 206 Mass. 365. In the *Hummer* case the Circuit Court of Appeals confirmed that an Illinois mortgagee has a legal title sufficient to maintain actions based on title, and upheld a mortgagee's right to sue a third party for waste. In the *Delano* case, the Massachusetts court upheld a mortgagee's right to sue the lessee of mortgaged property for waste arising out of the manner of use of the property by the lessee.

2. In failing to uphold the right of the mortgagee to sue as the third party beneficiary of the lessee's covenant to maintain and operate the mortgaged property, the decision of the Circuit Court of Appeals herein is in conflict with the rule, obtaining in Illinois, which permits third party beneficiaries to sue the covenantor.

Carson Pirie Scott & Co. v. *Parrett,* 346 Ill. 252;
Fleming v. *Dillon,* 370 Ill. 325;
Eddy v. *Roberts,* 17 Ill. 505;
Appeal of Willing v. *Continental Illinois Nat'l Bank,* 300 Ill. App. 127.

The right of a third party beneficiary to sue had previously been recognized by the same Circuit Court of Appeals in *In re Wolf Manufacturing Industries,* 56 F. (2d) 64.

In connection with this aspect of the cause, the Court should be apprised of the fact that the Electric Company correctly argued below that, if the promise relied upon by the third party beneficiary was not intended to benefit such third party, he could not sue. It incorrectly argued, however, that to constitute an intent to benefit the third party the promise had to be one to perform acts in addition to those which the promisee was under a duty (to the third party beneficiary) to perform. Whether the court below adopted that erroneous argument cannot be known, in the absence of any opinion by that court. If it did, the decision conflicts with the Illinois cases cited above. As to the question of intent to benefit the mortgagee, the covenant involved would appear to be clear. It expressly refers to the mortgagee bondholders and clearly

indicates that they are intended to be protected thereby.* In any event a summary dismissal of such a suit is unwarranted in view of the rule in Illinois that the question of intent to benefit the third party "is to be gleaned from a consideration of all of the contract and the circumstances surrounding the parties at the time of its execution" (*Carson Pirie Scott & Co.* v. *Parrett,* 346 Ill. 252, at 258).

3. In failing to hold that the adoption of the lease by the mortgagor's receiver did not bar the mortgagee's right to sue either for waste or, as a third party beneficiary, for breach of the covenant to maintain and operate, the Circuit Court of Appeals was in error. Since one's rights can be affected by prior judicial proceedings only if he was a party, or represented therein, this holding is necessarily based on the theory that the receiver represented the mortgagee, and his affirmance of the lease forecloses the mortgagee from maintaining such suits.

The decision of the Circuit Court of Appeals is in conflict with the fundamental theory that a federal equity receiver is merely a custodian.

> *Quincy M. and P. R. R. Co.* v. *Humphreys,* 145 U. S. 82, 97;
>
> *Union Bank of Chicago* v. *Kansas City Bank,* 136 U. S. 223, 236;

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* The covenant reads:

"The Electric Company shall maintain and operate the premises and equipment leased and install and operate any necessary new and/or substituted equipment at its own expense and eventually and at any time make such substitution of equipment as may be necessary to supply electrical energy at 60 cycles instead of the present 25 cycles, with the understanding, however, that the Electric Company shall have the right to discontinue the use of and dispose of any equipment no longer required for the supply of electrical energy to the railroad company, but in so doing shall have in mind and be bound at all times by the prior rights of security holders under both present and future mortgages of the Railroad Company" (R. 12).

Powell v. *Maryland Trust Co.*, 125 F. (2d) 260, 271 (C.C.A. 4th).

It is in conflict with the rule that such a receiver has no greater rights or powers than the corporation of which he is receiver—in this case, the mortgagor.

Nicholson v. *Western Loan & Bldg. Co.*, 60 F. (2d) 516 (C.C.A. 9th).

It conflicts with the rule that a receiver's rights and powers, as well as his representation, depend to a large extent upon the question of for whose benefit and in whose right he has been appointed.

Kane v. *Roxy Theatres Corp.*, 63 F. (2d) 754 (C.C.A. 2d).

In this cause, the receiver having been appointed at the suit of a creditor other than the mortgagee, his adoption of the lease, years before the institution of foreclosure proceedings and the extension of the receivership thereto, should not affect the mortgagee's right to sue the lessee for acts and omissions impairing the value of the security.

4. It is further suggested that the omission of the courts below to render any opinion or assign any reasons for the summary dismissal of petitioner's suit constitutes a departure from the accepted and usual course of judicial proceedings, calling for an exercise of this court's power of supervision.

Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. *United States*, 275 U. S. 404, at 414.

CONCLUSION

Wherefore, it is respectfully submitted that a writ of certiorari be granted to review the decision herein of the Circuit Court of Appeals for the Seventh Circuit.

IRVING L. SCHANZER,
Counsel for R. K. Japha, Petitioner.

August 5, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

R. K. JAPHA, suing on his own behalf and on behalf of all other owners of First and Refunding Mortgage Gold Bonds, Series A, due January 1, 1951, of Chicago, Aurora & Elgin Railroad Company,

Petitioner,

vs.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation, and CITY NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking association,

Respondents.

MOTION TO DISPENSE WITH PRINTING AND SERVICE OF PORTIONS OF THE RECORD

The record on appeal in the Circuit Court of Appeals consisted of all the papers submitted to the District Court on the motion. In addition, the Electric Company filed an Additional Designation of Content of Record (R. 41-48) for the purpose of making part of the record in the Circuit Court of Appeals certain of the proceedings in the receivership proceeding comprising 216 typewritten pages, on the ground that the District Court took judicial notice thereof.

By stipulation approved by order of the District Court (R. 52) and by the Circuit Court of Appeals (R. 56), one photostat copy of the papers included in said Additional Designation of Content of Record was filed with the original Transcript of Record and the printing of such papers was dispensed with. The rest of the record on appeal was printed.

Extended reference to the unprinted portion of the record below will probably be unnecessary, and it is submitted that as in the Circuit Court of Appeals, the printing of said photostat portion of the record be dispensed with.

There is submitted herewith a certified photostat copy of said portion of the record.

It is respectfully requested that this court dispense with the printing of said portion of the record which was not printed below, and that the petition for a writ of certiorari herein, and the appeal if the writ be allowed, be heard on the record as printed below and on the certified copy of said unprinted portion of the record.

Respectfully submitted,

IRVING L. SCHANZER,
Counsel for R. K. Japha, Petitioner.

No. 237

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

R. K. JAPHA, SUING ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER OWNERS OF FIRST AND REFUNDING MORTGAGE GOLD BONDS, SERIES A, DUE JANUARY 1, 1951, OF CHICAGO, AURORA & ELGIN RAILROAD COMPANY,

Petitioner,

vs.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, A CORPORATION, AND CITY NATIONAL BANK & TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION,

Respondents.

REPLY OF PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, A CORPORATION, RESPONDENT, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner,

vs.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, A CORPORATION, AND CITY NATIONAL BANK & TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION,

Respondents.

REPLY OF PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, A CORPORATION, RESPONDENT, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This respondent, Public Service Company of Northern Illinois, a corporation, respectfully submits this, its reply to the petition for writ of certiorari to review the decision and order of the United States Circuit Court of Appeals

for the Seventh Circuit in the above cause affirming the order of the District Court for the Northern District of Illinois, Eastern Division, which dismissed the petitioner's action against this respondent, Public Service Company of Northern Illinois.

STATEMENT.

The petitioner has given such an incomplete and misleading statement of facts that it would be difficult for this court to pass upon the application of the law involved without our amplifying the statement contained in the original petition.

This suit is brought upon an alleged violation of the terms of an instrument called a lease agreement between the respondent, Public Service Company of Northern Illinois, and the Chicago, Aurora & Elgin Railroad Company, which instrument is, in effect, a conditional sales contract of certain equipment and property, requiring annual payments of $185,000 for the first year and for each succeeding 29 years, a sum of $5,000 less than the annual amount payable for the year next preceding such a succeeding year, and that at the end of the 30 year period, all of the equipment and property shall become the property of the Public Service Company of Northern Illinois.

The agreement further provides that any replacements made by the Public Service Company of Northern Illinois shall be their property. The instrument contains no option on the part of either party but is an outright agreement to purchase, providing for prepayments over a period of 30 years, during which time the title remains in the seller until the final payment is made. The respondent, Public Service Company of Northern Illinois, has paid the annual

rental regularly to the Chicago, Aurora & Elgin Railroad Company until the appointment of a receiver for the Railroad Company, and since the appointment of the receiver, the rental has been regularly paid to the receiver. The Public Service Company of Northern Illinois has also paid all taxes and special assessments levied against the property, and complied with all the provisions of the agreement, and has indicated its intention to continue to comply with all the terms and conditions of the agreement.

The statement of the petitioner does not advise this court that the District Court, in which his complaint was filed, was the same court in which the receivership proceedings of the Chicago, Aurora & Elgin Railroad Company have been pending since 1932. That the District Court took judicial notice of the said receivership case and the foreclosure suit brought in the same court by the Trustee securing the bonds of the plaintiff, which two matters have been consolidated as cause Nos. 15893 and 12125 in the District Court of the United States for the Northern District of Illinois, Eastern Division.

Petitioner's statement fails to advise the court that the petitioner stipulated in the Circuit Court of Appeals for the Seventh Circuit that the said Circuit Court of Appeals may take judicial notice of the said consolidated cause (R. 49-50). Therefore, the facts upon which the trial court based its finding and judgment, and upon which the United States Circuit Court of Appeals for the Seventh Circuit considered the case upon appeal, are not limited to the allegations of the complaint but include the record of the consolidated cause No. 15893 and No. 12125 pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, as brought up to the Circuit Court of Appeals by photostatic copies of said record and incorporated in the printed record by reference. In the said consolidated cause, the court appointed

highly competent engineers to study and report with reference to the agreement herein sued upon, and after a thorough study by said engineers and due consideration by the receivers, the District Court entered an order authorizing and instructing the receivers to affirm and adopt the agreement herein sued upon (P.R.). The District Court recognized the agreement with the Public Service Company of Northern Illinois as a long term purchase agreement and, at various times, ordered insurance losses with respect to said property, paid over by the receivers to the respondent, Public Service Company of Northern Illinois (P.R., order dated February 26, 1935; P.R., order dated October 26, 1937; P.R., order dated December 10, 1937).

On December 16, 1937, the Trustee, under the mortgage securing the bonds of the petitioner herein, filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, for leave to file its Bill of Complaint for foreclosure (P.R.), which was allowed, and the foreclosure proceeding is pending in the consolidated cause of which the District Court and the Circuit Court of Appeals for the Seventh Circuit took judicial notice in its finding and judgment to dismiss from the petitioner's cause of action, the respondent herein, Public Service Company of Northern Illinois, in this proceeding.

The agreement herein sued upon was entered into more than 16 years prior to the filing of the complaint of the petitioner herein, at which time approximately twenty-five per cent of the property involved in said agreement was obsolete, and none of it was new (P.R.). That all of the property covered by the agreement herein sued upon, on which waste is charged by the petitioner, is personalty, over 16 years old, and some of it as much as 40 years old and fully depreciated (P.R.).

JURISDICTION OF THIS COURT.

This court is without jurisdiction to allow a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in this matter under rule 38, paragraph 5 of this court or under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347-a), in that, the decision of the United States Circuit Court of Appeals for the Seventh Circuit is not in conflict with any local law of Illinois, decisions of other Circuit Courts of Appeal or any decisions of this court in any respect.

SUMMARY OF LAW RELIED ON.

I.

To give a third party an action on a promise there must be an intent by the promisee to secure a direct benefit to the third party and also some privity between the promisee and the third party, and some obligation of the promisee to the third party which would give him a legal or equitable claim to the benefit of the promisor or an equivalent from the promisee.

Federal Surety Company v. *Minneapolis Steel and Machinery Company,* 17 Fed. (2d Series) p. 243.

Louisville Trust Co. v. *City of Cincinnati,* 76 Fed. 296 (22 C. C. A. 334).

German Alliance Insurance Co. v. *Home Water Supply Co.,* 226 U. S. 220, 227.

II.

The only remedy in equity which the plaintiff or the Trustee under the mortgage may maintain would be for an injunction to restrain anticipated waste or anticipated impairment of the security pledged under the mortgage but cannot sue for waste which has already accrued.

The Ohio Coal Co. v. *N. P. Daughetee,* 240 Ill. 361-368.

Merchants Union Trust Company, et al. v. *New Philadelphia Graphite Company, et al.,* 83 Atl. 520; 10 Delaware Ch. 18.

41 Corpus Juris 649.

(A) The agreement of January 15, 1925, being an installment purchase agreement, neither the Trustee under the mortgage nor the plaintiff can sue for waste.

John H. Fifer v. *Melissa E. Allen, et al.,* 228 Ill. 507-521.

John W. Keogh v. *Robert B. Peck,* 316 Ill. 318-326.

ARGUMENT.

I.

To give a third party an action on a promise there must be an intent by the promisee to secure a direct benefit to the third party and also some privity between the promisee and the third party, and some obligation of the promisee to the third party which would give him a legal or equitable claim to the benefit of the promisor or an equivalent from the promisee.

This is a third party action where the holder of a mortgage bond issued by one party to an agreement is suing the other party to the agreement, and in order to bring this suit, the petitioner must show that the agreement entered into between the parties and herein sued upon, or at least one provision thereof, is for the direct benefit of the petitioner or mortgagee who is not a party to the agreement. The law with respect to the right of third party actions is well defined in the Illinois cases and, unless the facts alleged in the complaint clearly show a direct benefit to the petitioner was intended by the parties to the agreement, the petitioner's action fails.

The only reference to the security holders in the entire agreement of twenty-nine pages is that stated in the excerpt in the footnote of petitioner's petition on page 8. That single reference to the rights of security holders is to say that if the respondent should discontinue the use of, and dispose of any equipment no longer required, it should have in mind, and be bound by, the prior rights of the security holders.

There is no allegation in the complaint of the petitioner that the respondent, Public Service Company of Northern Illinois, has disposed of any equipment and, therefore, petitioner has no right to attempt to invoke that single reference to the rights of security holders in said agreement.

The complaint of the petitioner is also fatal because he does not allege that the security has depreciated so as to impair the security of the mortgage (41 C. J. 649). The respondent takes no issue with the petitioner on the law cited in support of the principle of third party actions, but the facts do not come within that line of cases.

In the first place, it must be determined whether the agreement entered into between the Railroad Company and the respondent, Public Service Company of Northern Illinois, herein sued upon, is for the direct benefit of the petitioner or mortgagee. Certainly the respondent did not assume any of the obligations under the mortgage. While under the agreement, the respondent is to substitute new equipment at its own expense, the agreement also provides that such new equipment is to be the property of the respondent and that the Railroad Company has no rights of reversion, or any other rights therein. Therefore, the installation and substitution of new equipment and machinery can in no way be for the benefit of the petitioner or mortgagee.

Even as to disposing of abandoned equipment, there is no provision for the benefit of the petitioner or mortgagee, either direct or incidental, as it provides only that, in case of disposing of any equipment no longer required, the respondent shall have in mind and be bound by the prior rights of security holders. However, there being no allegation in the complaint that the respondent, Public Service Company of Northern Illinois, has disposed of

any machinery or equipment, it is not necessary to determine whether that provision of the agreement is for the direct benefit, incidental benefit or any benefit of the petitioner or mortgagee. In all the cases cited by petitioner in paragraph 1 of his argument involving third party actions, they are all tort cases except the case of *Minneapolis Trust Co.* v. *Verhulst,* 74 Ill. App. 350 (petitioner's Brief, page 6). This is a foreclosure suit wherein the lessee was joined and the relief prayed against the lessee was for waste. In that case (page 356), the court said:

> "An action at law by the mortgagee will not lie for the commission of waste."

The court points out that the proper remedy against the lessee is for injunction to stay the commission of waste.

The case of *Nelson* v. *Pinegar,* 30 Ill. 473, and *Citizens National Bank* v. *Joseph Keisl & Sons,* 378 Ill. 428 (Pet. p. 6) are both cases in tort and could not support a complaint brought upon a contract.

The case of *Hummer* v. *R. C. Hoffman Construction Company,* 63 Fed. (2d) 372-374, cited by counsel in his petition (page 6) is a suit in law (case) for trespass, and neither privity of contract nor estate is involved and accordingly not discussed. It was, in fact, an action for waste in tort for trespass *quare clausum fergit,* against a stranger.

The case of *Delano* v. *Smith,* 206 Mass. 365, cited by counsel in his petition (page 6) is likewise a tort case.

The cases cited by counsel in paragraph 2 of his argument (page 7) are all cases where contracts are made for the direct benefit of the third party suing and so intended at the time of making the contract and we take no issue with counsel as to the law of Illinois with respect to such line of cases, but deny that there are any allegations in the complaint, or any facts considered by the trial

court or the Circuit Court of Appeals in consolidated causes of which they took judicial notice that would bring the petitioner within the rule of these cases.

Likewise counsel, in paragraph 3 of his petition (page 8), assumes that the decisions of both the trial court and the Circuit Court of Appeals were based upon his incapacity to sue as a holder of a bond because of the pendency of the foreclosure proceeding. We take no issue with counsel on the law as defined in the line of cases cited by counsel under paragraph 3 of his argument (page 8), but like paragraph 2 of his argument, is based upon a false premise. The point is not that the petitioner is barred from bringing an action because of the pendency of the foreclosure proceeding and the receivership proceeding, but the point is that the lower court took judicial notice of the proceedings in the foreclosure case and the receivership case, and this is not only within their right (*Louisville Trust Co.* v. *City of Cincinnati*, 76 F. 296, 22 C.C.A. 334) but was stipulated to in the Circuit Court of Appeals by the petitioner (P.R.).

The courts have frequently interpreted provisions of agreements to determine whether they are for the direct benefit of a third person not a party thereto, and in *Federal Surety Company* v. *Minneapolis Steel and Machinery Company*, 17 Fed. (2d Series) 243-244, the court said:

> "The right of the third person to maintain an action on the contract in his own name is in a sense remedial, but the right to sue depends upon the substantive right of such third party under the contract. It depends upon whether the obligation of the contract creates a direct liability from the promisor to the third person in his own right and not in the right of another. It involves an interpretation of the contract."

Again, in the same case, on page 243, the court points out quotes from a decision of this court, *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 227:

> "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit."

II.

The only remedy in equity which the plaintiff or the Trustee under the mortgage may maintain would be for an injunction to restrain anticipated waste or anticipated impairment of the security pledged under the mortgage but cannot sue for waste which has already accrued.

The court should not lose sight of the important fact that the only interest of the petitioner in the property involved in the agreement between the Railroad Company and the respondent, Public Service Company of Northern Illinois, is one in which the defendant has, at most, a contingent interest, contingent upon the default of the Public Service Company of Northern Illinois to make the stipulated payments, and contingent upon the recovery of the property by the mortgagor. In the *Ohio Coal Co.* v. *N. P. Daughetee*, 240 Ill. 361-368, the court said:

> "A contingent remainder-man has no certain estate in the land, and therefore no standing to maintain an action at law for past waste or a bill for an account thereof; but though his claim depends upon a contingent event, he may maintain a bill against a life tenant to enjoin future waste."

In the case of *Merchants Union Trust Company* v. *New Philadelphia Graphite Company* (83 Atl. 520; 10 Delaware

Ch. 18) in which case the plaintiff was the Trustee of the mortgage made by the owner of the mine, the bonds were in default and a foreclosure suit had been filed. The relief sought was for the rents and royalties due under the lease and also damages for waste and depreciation of the security pledged under the mortgage. The lease had been entered into subsequent to the mortgage, as in the case at bar, and no provision was made in the mortgage for the Trustee to have any right of action against the lessee or third persons contracting with the mortgagor. All of the facts and circumstances are identical to the case at bar. In that case the court said:

> "It is unnecessary to consider whether any waste, within the meaning of the law, was committed by the lessees in using or working the land in a mining lease and for the purpose for which it was leased, because it is clear that the complainants are not entitled to recover from the lessees, damages for any waste that may have been committed. There is no doubt that the mortgagee for the protection of his security was entitled, as against the mortgagor, to an injunction to restrain any waste which put in peril his security, but he cannot recover from the lessees or their assigns, damages for waste they may have committed."

In 41 Corpus Juris 649, it re-states the law as set forth above but adds that where a mortgagor in possession or his assigns or anyone acting under their authority or direction threatens to commit waste upon the mortgaged premises, as by cutting timber, removing buildings, or taking away machinery or other fixtures to such an extent as will impair the security of the mortgage, equity will grant the latter a Writ of Injunction to restrain the anticipatory injury.

(A) The agreement of January 15, 1925, being an installment purchase agreement, neither the Trustee under the mortgage nor the plaintiff can sue for waste.

An examination of the lease agreement (Photostatic record) discloses the fact that while it is called a lease agreement, the defendant, Public Service Company of Northern Illinois was to become the sole owner of the property after 30 years of payments as provided under the agreement and any new equipment which constituted a replacement was to be the absolute property of the defendant, Public Service Company. Therefore, it is not even an option agreement to purchase but an absolute agreement to purchase over a 30 year period. In the case of *Keogh* v. *Peck*, 316 Ill. 318-326, the court says:

> "Where, however, in a lease a tenant is given an option to purchase the premises at any time before the expiration of the lease, while the tenant until the privilege of purchase is offered remains a mere tenant, subject to the same obligations as other tenants and answerable for any waste committed by him, still his liability to a suit for waste is suspended until it is known whether or not he will avail himself of his privilege. The fact that the estate will ever revert to the landlord is not fixed and certain and while the legal right to exercise the option remains, there can during such term be no act of waste committed which the tenant cannot avoid by the exercise of his right to purchase."

It is therefore apparent in this case where there is no option to purchase but an agreement to purchase over a 30 year period so that neither the mortgagor nor the bondholders secured by said mortgage have the right to sue for waste.

In the case of *Fifer* v. *Allen*, 228 Ill. 507-521, the court there said:

> "A court of chancery will interfere to enjoin equitable waste by the owner of a base or determinable fee only when the contingency which is to determine the estate is reasonably certain to happen and the waste is of a character to charge the owner with wanton and unconscientious abuse of his rights."

CONCLUSION.

Wherefore, it is respectfully submitted that the writ of certiorari to review the decision herein of the Circuit Court of Appeals for the Seventh Circuit be denied.

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